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Nos. 79-374 and 79-386

IN THE

Supreme Court of The United States

October Term, 1979

BIRMINGHAM TRUST NATIONAL BANK,
Petitioner

v.

JACK H. HARRISON, et al.

JACK H. HARRISON, Petitioner

v.

BIRMINGHAM TRUST NATIONAL BANK, et al.

ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

RESPONSE OF BIRMINGHAM TRUST NATIONAL BANK TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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A.

Apparently with the concurrence of the Comptroller of the Currency ("Comptroller"), the Solicitor Gen-

eral recommends denying BTNB's petition in No. 79-374 because the Alabama Supreme Court has not *openly admitted* that it has attacked, and effectively overruled, the Comptroller's appraisal of the Trust's stock. The narrow basis for the Solicitor General's recommendation is made clear by his qualifying statement that "If the decision were a direct challenge to the Comptroller's appraisal . . . we would, of course, adopt a different position," and by the accompanying footnote 6. (Sol. Gen. Br., p. 7)

It is difficult to understand the Solicitor General's acceptance of the characterization given by the Alabama Supreme Court to its holding, while ignoring its real effect. He seems to believe, naively we submit, that future readers of the opinion below will not perceive how neatly the Alabama Court has nullified the Comptroller's action.

In *Simonds v. Guaranty Bank & Trust Co.*, which the Solicitor General implies he would urge this Court to review if the lower courts should fail to uphold the finality of the Comptroller's appraisal (see fn. 6, Sol. Gen. Br., p. 7), a dissenting stockholder, being dissatisfied with the amount of the Comptroller's appraisal, seeks (a) to set aside the award and (b) obtain a new appraisal, which he hopes will result in a larger award. In the present case, the Trust, as a dissenting stockholder, has achieved the same end result (a new appraisal[1] with a larger award) by simply ignoring the Comptroller's appraisal. The fact that the justification in the present case for opening up the question whether the dissenter's stock may have been undervalued by the Comptroller was a finding that

[1]It is clear that the sole measure of the supplemental award to the Trust was the trial judge's redetermination of the value of the dissenter's shares on the effective date of the merger. (See BTNB Pet., pp. 36-38, 46-48.)

BTNB was guilty of misconduct[2] under state law does not change the fact that the Comptroller's award has been, effectively, set aside and a wholly new appraisal by a different tribunal substituted in its place.

Such an obvious subversion of the principle underlying the Supremacy Clause should not be tolerated. It has long been the position of this Court that infringement upon federal rights and prerogatives cannot be successfully concealed behind the labels assigned by state courts. Instead, the validity of state action must be judged by its real effect. *Corn Products Ref. Co. v. Eddy,* 249 U.S. 427, 432, 63 L.Ed. 689, 693 (1919); *St. Louis S.W. R. Co. v. Arkansas,* 235 U.S. 350, 362, 59 L.Ed. 265, 271 (1914); *Reitman v. Mulkey,* 387 U.S. 369, 373, 18 L.Ed.2d 830, 834 (1967); *Colonial Pipeline Co. v. Traigle,* 421 U.S. 100, 113, 44 L.Ed.2d 1, 12 (1975). State authorities cannot be permitted to achieve forbidden ends through indirection. *Anderson v. Martin,* 375 U.S. 399, 404, 11 L.Ed.2d 430, 433-4 (1964).

The disregard, and subversion, of federal authority over the merger process for national banks in the decision below is obvious. The fact that the parties in this case stand in a somewhat unusual relationship is of little importance. Many reasons can be found for condemning the actions of national banks under state law. If the decision below is permitted to stand, the stability that flows from federal authority over this important aspect of the merger process for national banks will have been significantly undermined. It is for this reason that the petition filed by BTNB should be granted.

[2]We have shown how flimsy the finding of misconduct is. (See BTNB Pet., pp. 17-18.)

B.

As to the counter-petition filed for the Trust (No. 79-386), we stress that, despite the claims in the Temporary Trustee's petition, the federal questions he would like to present to this Court have not been adequately preserved. (See BTNB's Brief in Opposition.)

The statement on page 6 of the Solicitor General's brief that "Both trustees filed a second appeal to the Alabama Supreme Court" is false or, at best, misleading. The Temporary Trustee, Harrison, took no appeal whatever to the Alabama Supreme Court. The co-trustee, Henley,[3] did file a cross-appeal, but it was limited to the question of who should pay the legal fees of the Trust in this litigation. Mr. Henley has no petition pending before this Court.

C.

Finally, we feel compelled to note that, contrary to the statement on page 2 of the Solicitor General's brief, BTNB's proxy materials describing the proposed reorganization contained a full statement of the appraisal rights of dissenting shareholders. (CC Ex. 69)

[3]We doubt that Mr. Henley had authority to act for the Trust at all, because the Alabama Supreme Court had directed that a temporary trustee be appointed *in lieu* of the named co-trustees to act for the Trust in the present litigation. (See BTNB Pet., p. 81.)

Respectfully submitted,

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